IVOR E. SAMSON (SBN 52767)
PAULA M. YOST (SBN 156843)
SANFORD KINGSLEY (SBN 99849)
JEFFRY BUTLER (SBN 180936)
SONNENSCHEIN NATH & ROSENTHAL LLP
525 Market Street, 26th Floor
San Francisco, California 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300

JOSEPH W. COTCHETT (SBN 36324)
NIALL McCARTHY (SBN 160175)
COTCHETT, PITRE & McCARTHY
840 Malcolm Road
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

MICHAEL L. BOLI (SBN 87937)
LAW OFFICE OF MICHAEL L. BOLI
1501 37th Avenue, Suite G
Oakland, California 94601
Telephone: (510) 535-9001
Facsimile: (510) 225-4005

Attorneys for Plaintiffs
RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA; RUMSEY GOVERNMENT PROPERTY FUND I, LLC; RUMSEY DEVELOPMENT CORPORATION; RUMSEY TRIBAL DEVELOPMENT CORPORATION; RUMSEY MANAGEMENT GROUP; AND RUMSEY AUTOMOTIVE GROUP

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA, et al.,

Plaintiffs,

vs.

HOWARD DICKSTEIN, et al.,

Defendants.

Case No. 2:07-CV-02412-GEB-EFB

MEMORANDUM OF POINTS AND AUTHORITIES OPPOSING DEFENDANTS' MOTION FOR TERMINATING SANCTIONS (DISMISSAL) OR, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER AND OTHER SANCTIONS

Judge: Hon. Garland E. Burrell, Jr.
Dept.: Courtroom 10
Date: Jan. 28, 2008
Time: 9:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

I. INTRODUCTION

In a motion that crosses the line from zealous advocacy to reckless lawyering, Defendants accuse Plaintiff Rumsey Band of Wintun Indians (and "perhaps their new attorneys") of tampering with evidence by intimidating a key witness, based on nothing more than innuendo, speculation, and manufactured evidence. To "support" their desperate charge — which goes so far as to allege Plaintiffs "clearly" committed a felony — Defendants omit key facts, selectively quote from documents, and recount events out of chronological sequence and out of context. Not only do the dictates of the law (not to mention professional ethics) require that accusations of criminal conduct be leveled with extreme caution, one would expect such a charge to be supported with actual, concrete evidence of the "crime." There is no such evidence here because Plaintiffs have acted appropriately at all times. Moreover, the very witness Defendants claim the Tribe has intimidated — former Tribal Chairperson Paula Lorenzo-Tackett — refutes those allegations under oath. Defendants' motion is pure fiction.

What Defendants have failed to tell the Court is that the Tribe's governing body (its Tribal Council) took the action about which Defendants complain — initiating an intra-tribal hearing process involving the former Tribal Chairperson and suspending her *with pay* from her appointed government positions pending that hearing — because it concluded she failed to cooperate in an investigation seeking information. The Council first initiated this action more than a month **before** the parties met to mediate their dispute in an effort to avoid this litigation, and thus before the Council was even aware the former Chairperson had signed documents purporting to support the Tribe's former advisors. When the Tribal Council did ultimately decide to file this lawsuit, it suspended the intra-tribal hearing process and retained independent legal counsel for the former Chairperson to ensure her interests are protected. These facts alone are all the Court needs to deny Defendants' motion outright. To the extent the Court has any remaining concern as to the veracity of Defendants' accusation, it should do what Defendants irresponsibly neglected to do: It should ask the witness, in the presence of her own counsel and *in camera* if it desires, whether Tribal officials have intimidated her and otherwise influenced her position. As shown by her testimony, the answer is "no."

The ironic — and highly disturbing — truth underlying Defendants' motion is that since their termination by the Tribe in June 2006, the former advisors have been on a concerted campaign to *manufacture* evidence designed to exculpate them. On at least two occasions, Howard Dickstein and Jane Zerbi (apparently with Arlen Opper's knowledge and complicity) prepared documents purporting to refute the findings of the Tribe's investigation, and then pressured Ms. Lorenzo-Tackett, the former Chairperson, to sign the documents because (they told her) the Tribe's investigation was politically motivated and *she* was the target. Defendants now wave one of these self-serving and self-generated documents before this Court (without revealing that they drafted the document), seeking to gain evidentiary advantage from their own deception by claiming it is "evidence" of the Tribe's witness tampering and asking the Court to deem its content true and incontrovertible. (The other manufactured document constitutes fake "minutes" of a Casino Board of Directors meeting that never occurred.) Having manipulated their own former client for purposes of concocting the very evidence upon which they now rely, Defendants attempt to make a mockery of this proceeding. In fact, it is Defendants who should be sanctioned for bringing a scurrilous motion that seeks to mislead this Court and gain evidentiary advantage from their own misconduct.[1]

[1] The timing of Defendants' motion is both inappropriate and abusive, forcing Plaintiffs to go to the effort and expense of demonstrating its lack of merit at a time when the Court's jurisdictional competence to hear this case at all is in serious doubt. Plaintiffs' pending motion to remand should be decided first, before the Court resolves this motion. As the Ninth Circuit has held, the district court must resolve challenges to its jurisdiction before exercising its power to decide other disputes. *See Toumajian v. Frailey*, 135 F. 3d 648, 657-58 (9th Cir. 1998) (reversing monetary sanction district court ordered before deciding remand motion because "hierarchy of decision-making" obligated it to consider the motion to remand, and the threshold question of subject-matter jurisdiction, first).

II. FACTUAL BACKGROUND[2]

A. The Tribe Terminates Its Prior Counsel And Advisors, And Continues With An Investigation Designed To Obtain Truthful Information.

In January 2006, the adult members of the Rumsey Band of Wintun Indians ("Tribe") elected a new Tribal Council, the Tribe's governing body. (Declaration of Marshall McKay ("McKay Decl."), ¶ 3.) Thereafter, in connection with the newly elected Council's efforts to understand the state of the Tribe's financial affairs, and in the face of difficulties associated with securing needed information from the Tribe's then General Counsel (Howard Dickstein and Jane Zerbi of Dickstein & Zerbi) and financial consultant (Arlen Opper), the Tribal Council retained an outside investigative firm (Kroll). (McKay Decl., ¶ 3.) Kroll's investigation uncovered discrepancies associated with the Tribe's business dealings, and in that regard, raised serious questions about the actions and omissions of Dickstein, Zerbi and Opper. (McKay Decl., ¶¶ 3-5.) On the basis of those findings, the Tribal Council voted in June 2006 to terminate them and, with new counsel, pressed forward with the investigation in order to understand the full scope of what had occurred. (McKay Decl., ¶ 3.) As part of that investigation, the Tribe's new counsel interviewed current and former Tribal Council members. (McKay Decl., ¶ 3.) All Tribal members were generally told an investigation was pending; however, in order to protect the investigation's objectivity, no member (including no member on the Tribal Council) was informed of the specific content of witness interviews while the investigation was pending. (McKay Decl., ¶ 3; *see also* Lorenzo Decl., ¶ 8.)

---

[2] Defendants' motion contains much factual detail that is not only untrue, but irrelevant, and apparently nothing but a gratuitous effort to cast aspersions and malign the integrity of the current Tribal Chairman, Marshall McKay. Contrary to Defendants' assertions (supported by *no* evidence), the Tribal Chairman has not "handed out lucrative committee positions" to his relatives. (Mem. at 3:26-4:1.) Rather, the Tribal Council appointed Tribal members to the Tribe's committees, Fire Commission and Casino Board. (McKay Decl., ¶ 17.) The Chairman (and Paula Lorenzo) are, in fact, related to many of the appointees. As Defendants know, Rumsey is a small tribe and most people are related to each other. (*Id.*)

B. The Tribal Council Initiates Action Vis-à-vis Its Former Tribal Chairperson For Failing To Provide Needed Information To The Tribe.

In the course of the Tribe's investigation, the Tribal Council was informed the Tribe's former Chairperson (Paula Lorenzo) was resisting being interviewed about the Tribe's interest in a West Sacramento property ("the Triangle") owned jointly by the Tribe and entities owned and controlled by Defendant Mark Friedman and his family ("Friedman"). (McKay Decl., ¶ 4; *see also* Complaint, ¶¶ 119-127.) The Tribe's legal counsel was attempting to determine the circumstances under which the Tribe had "sold" 80% of its interest in the property to a Friedman-controlled entity in a transaction that had no economic substance to it. As Ms. Lorenzo had signed the transaction documents, the Tribe's counsel needed to ask her questions about the transaction. (McKay Decl., ¶ 6.) Despite repeated efforts by the Tribe's legal counsel to schedule an interview for this purpose, the efforts met resistance and failed. (*Id.*, ¶¶ 6-7.) Accordingly, in an effort to underscore the importance of the former Tribal Chairperson's cooperation in the ongoing investigation, the Tribal Council authorized the Chairman to send a letter directing her to meet with the Tribe's attorneys to answer their questions about the Triangle transaction. (McKay Decl., Ex. A.) (This is the first letter upon which Defendants' base their motion and from which they partially quote. (Mem. at 4:19-5:2.).)

Thereafter, the Tribal Council learned that notwithstanding its directive, no meaningful cooperation was provided, as a scheduled meeting ended abruptly without the former Chairperson providing any information. (McKay Decl., ¶ 7.) Members of the Tribal Council were disappointed in the inability of the Tribe's legal counsel to secure needed information from another Tribal member, particularly from the Tribe's former Chairperson who had signed the relevant documents. (*Id.*, ¶¶ 6-7.) As a result, in June 2007, the Tribal Council concluded it needed to bring the entire matter before the Tribal membership, the Community Council, for a hearing. (*Id.*, ¶ 8.)

At this planned tribal hearing, the Tribal Council anticipated the Community Council would be informed of the investigative findings and the former Chairperson's non-cooperation in the investigation, and that it would decide the appropriate action. (McKay Decl., ¶¶ 7-8.) To that end, the Tribe's legal counsel was charged with exploring various judicial dispute processes

that could be used (since the Tribe has no court), and with locating an outside mediator or independent counsel who could present the evidence to the Community Council. (McKay Decl., ¶ 8.) Status reports were provided at the Tribal Council meetings that followed, and on or about September 4, 2007, the Tribal Council notified Ms. Lorenzo and the Tribal Community that she would be brought before the Community Council for failing to cooperate in the investigation, and that she would be suspended *with pay* from her government positions pending that hearing. (*Id.*, ¶ 9.) Shortly thereafter, the Tribal Council retained independent counsel for the intra-tribal hearing process. (*Id.*, ¶ 8) Thus, contrary to Defendants' assertion, the action taken against the former Chairperson was precipitated by her failure to provide needed answers for an investigation that sought information, not due to any position she purportedly took. (*Id.*, ¶¶ 6-9, 12.) The suspension was not an effort to influence the former Chairperson to take a particular position in this litigation, and indeed, the Tribal Council had not yet decided to even file litigation when the suspension occurred. (*Id.*, ¶¶ 10-12.) Further, and as the Tribe's former Chairperson herself testifies, she was repeatedly told the Tribe wanted only truthful — not particular — information, whatever implications that information had for the Tribe and its claims. (Lorenzo Decl., ¶ 4.)

C. The Failed Mediation — And Tribal Council's Discovery Of The Letter Signed By The Former Tribal Chairperson — Post-Dated The Council's Initial Action Vis-à-vis The Former Chairperson.

As Defendants' motion acknowledges, the Tribal Council had tried to resolve its claims against Dickstein, Zerbi and Opper through mediation (Mem. at 5:12-14), and the Tribe's governing body remained hopeful throughout the course of that process that the mediation would succeed. (McKay Decl.,¶ 11.) The first mediation session occurred on July 25, 2007 — more than a month ***after*** the Tribal Council had concluded it needed to bring the former Tribal Chairperson before the Community. (*Id.*, ¶¶ 10, 11.) The second session occurred on September 8, 2007. The mediation ultimately failed, culminating in the Tribal Council's decision on October 2, 2007, to file suit against Dickstein, Zerbi, Opper and others in California state court a week later. (*Id.*, ¶ 11.) After making this decision, the Tribal Council retained independent legal counsel to represent the former Tribal Chairperson. (McKay Decl., ¶ 15; *see*

also Lorenzo Decl., ¶ 1.)

D. Defendants Manufactured The Evidence Upon Which They Rest Their Motion, And Which They Ask This Court To Deem True And Incontrovertible.

As Opper testifies, the "evidence" Defendants submit to support their motion includes a document produced by Opper's attorney at a mediation on July 25, 2007. (Mem. at 5:16-6:3; Opper Decl., ¶ 3, Ex. B.) The document purports to be a letter dated July 20, 2007, sent to "Arlen, Howard and Jane," bearing Paula Lorenzo's signature, and containing statements supportive of their position. (Opper Decl., ¶ 3, Ex. B.) In fact, Paula Lorenzo testifies this document was actually prepared by Jane Zerbi (in the presence of Howard Dickstein and Arlen Opper) during a brief meeting Ms. Lorenzo had with them at Dickstein's office days before the mediation. (Lorenzo Decl., ¶¶ 20-23.) Incredibly, Defendants have not revealed this obviously material fact to the Court.

According to Ms. Lorenzo, the letter was presented to her at the end of the meeting, by Dickstein and Zerbi, as a document reflecting the statements she had made during that meeting. She further testifies that Dickstein, Zerbi and Opper induced her to make statements "supporting their view" during the meeting, with Dickstein in particular telling her she was the primary target of the Tribe's investigation, and that the Council could and would go so far as taking away her Tribal "citizenship" with its politically-driven investigation. (Lorenzo Decl., ¶¶ 15, 21.) She testifies they then pressured her to sign the second page of the document, telling her they might change the text to "make it sound better," and that they would send her a revised version for her signature. (*Id.*, ¶ 22.) She was never told the purpose for which they intended to use the document, and although prepared by a lawyer, the "letter" was not under oath. (*Id.*, ¶¶ 21-23.)

This "letter" is not the only evidence that certain Defendants manufactured.[3]

[3] The Tribe should clarify that it has no evidence, and no reason to believe, that Defendant Mark Friedman or any of the defendant entities in which he possesses an interest had any involvement in (or knowledge of) these efforts.

Specifically, Dickstein prepared what purport to be "minutes" of a Casino Board meeting he asked Paula Lorenzo to hold a week after his termination. (Lorenzo Decl., ¶¶ 11, 18-19.) According to Ms. Lorenzo, Dickstein asked her to convene a meeting with certain Tribal members who sat on the Casino Board, and sign the minutes he drafted, because the Tribe's most valuable asset (its casino) was at risk under the authority of the Tribe's new Chairman and guidance of new outside legal counsel.[4] (Lorenzo Decl., ¶ 18.) The pretend minutes for the fake meeting contain statements purporting to defend Dickstein, Zerbi and Opper (McKay Decl., ¶17)), purportedly refuting some of the factual findings of Kroll and, ultimately, factual allegations within the Tribe's Complaint.

III. LEGAL STANDARD

Defendants concede they must present "clear and convincing evidence" of witness tampering to secure the relief they seek under the court's inherent authority — outright dismissal, issue sanctions, and alternatively, the imposition of monetary sanctions. (Mem. at 11 n.8.) While the Ninth Circuit Court of Appeal has apparently not yet articulated the standard of proof where a party seeks sanctions under a court's inherent authority, most Circuits have, and require litigants to come forth with "clear and convincing evidence." This high standard is consistent with the punitive nature of the sanctions imposed under a court's inherent authority. *See Shepherd v. Am. Broad. Co.*, 62 F. 3d 1469, 1478 (D.C. Cir. 1995) (noting "fundamentally punitive" nature of relief and applying "clear and convincing" standard); *Hull v. Municipality of San Juan*, 356 F.3d 98, 100 (1st Cir. 2004); *Weinberger v. Kendrick*, 698 F. 2d 61, 80 (2d Cir. 1982); *Crowe v. Smith*, 151 F.3d 217, 236 (5th Cir. 1998); *Maynard v. Nygren*, 332 F.3d 462,

---

[4] Having relied upon the fake "minutes" to advance their position vis-à-vis the Tribe prior to this litigation (as the document contains self-serving statements defensive of Dickstein, Zerbi and Opper (McKay Decl., ¶ 17)), Defendants decline to do so now, in support of this motion. They are apparently aware the Tribe knows the minutes were fabricated. *See* Lorenzo Decl., ¶ 19 (testifying that she told Dickstein after the Tribe filed suit that she had informed the Tribal Council that Dickstein authored the pretend minutes, a statement to which he responded after a long silence, "That's unfortunate.") The document contains sensitive and confidential proprietary information and is not submitted here; however, the Tribe is prepared to provide the Court a copy of the document (as authenticated by Lorenzo) *in camera* if the Court desires.

468 (7th Cir. 2003); *Pfizer, Inc. v. Int'l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976); *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1288 (10th Cir. 1986).[5]

IV. ARGUMENT

Neither the law nor the record supports Defendants' motion. Dismissal of an action under a court's inherent authority is available in only the rarest of circumstances, and more specifically, where a plaintiff has "willfully deceived" the Court or "engaged in conduct utterly inconsistent with the orderly administration of justice." *Fjelstad v. Am. Honda Motor Co.*, 762 F. 2d 1334, 1338 (9th Cir. 1985) (quotation, citation omitted). Defendants submit *no evidence* — let alone clear and convincing evidence — that the Tribe has willfully deceived this Court or engaged in bad faith conduct designed to interfere with this judicial proceeding. As the evidence shows, the action about which Defendants complain was initiated months before the Tribal Council ever decided to proceed with this lawsuit, and thus before it knew there would be "testimony" from a "witness" in any "official proceeding" subject to state or federal authority.[6]

The Tribal Council also initiated this action *before* it knew about any letter that purported to support Defendants, and which Defendants now wave before this Court as

---

[5] The Tribe's research identified no Circuit authority embracing a lower standard in this context. At least two district courts in the Ninth Circuit have accepted the "clear and convincing standard" while others have noted uncertainty. *Compare Samuel v. Michaud*, 980 F. Supp. 1381, 1408 (D. Idaho 1996); *Pennar Software Corp. v. Fortune 500 Sys.*, 2001 WL 1319162, *5 (N.D. Cal. Oct. 26, 2001); *with Tuttle v. Combined Ins. Co.*, 222 F.R.D. 424, 428 (E.D. Cal. 2004) (expressing uncertainty but applying higher standard); *Rohn v. United States*, 2002 WL 32123927, *1 n.2 (E.D. Cal. Aug. 27, 2002) (same). In any event, the nuance is of little importance here because Defendants have no supporting evidence whatsoever.

[6] Although there existed no pending lawsuit (and no decision to file one), Defendants assert that by suspending the former Chairperson from her positions (with pay), the "Tribal Plaintiffs *clearly* have violated" a federal criminal statute penalizing those who intentionally influence a witness' testimony. *See* Mem. at 8:8-10 & n.5 (citing 18 U.S.C. § 1512 (criminalizing the act of knowingly influencing the "testimony" of any person "in an official proceeding"), and *Rent-A-Center, Inc. v. Canyon*, 944 F. 2d 597, 602 (9th Cir. 1991) (criminal statute "requires a finding of intent")); *see also* Mem. at 10:11 ("Tribal Plaintiffs have *indisputably* engaged in witness tampering..."). Modifying a baseless assertion with the adverbs "clearly" or "indisputably" does not make it true. The federal criminal statute is not even arguably implicated here, and but for Defendants' placement of their accusation of a criminal violation in a legal brief, it would be libelous *per se*. *See Barnes-Hind, Inc. v. Superior Court*, 181 Cal. App. 3d 377, 385 (1986) ("Perhaps the clearest example of libel per se is an accusation of crime.").

"incontrovertible" evidence that exculpates them. Furthermore, and most fundamentally, the action the Tribal Council took — suspension of a Tribal official (with pay) pending a hearing — was driven by the Council's conclusion that the official had failed to cooperate with an investigation of the Tribe's business affairs. That investigation sought nothing more than truthful information. Her suspension (with pay) from appointed governmental positions was entirely appropriate and consistent with the Tribal Council's duties to the Tribe. Not a shred of evidence shows the Tribal Council (or anyone else) sought to intimidate Ms. Lorenzo in connection with a lawsuit *that did not then even exist.*

While there is *no* evidence the Tribe "willfully deceived" this Court, or engaged in bad faith conduct designed to interfere with this process, the same cannot be said for Defendants. They have filed a motion to dismiss that is glaringly deceptive, telling this Court the Tribe's former Chairperson "wrote" a letter to Dickstein, Zerbi and Opper — a letter that purports to refute the factual predicate underlying the Tribe's claims (Mem. at 2:16-22, 3:2-6, 5:13-18) — when Dickstein, Zerbi and Opper well know she never "wrote" anything. Rather, the "letter" was created by Zerbi, in the law office of Dickstein & Zerbi, with the knowledge and complicity of Dickstein and Opper, at the end of a brief meeting they all attended. According to the former Chairperson, who is represented by independent counsel (not the Tribe's counsel), Howard Dickstein and Jane Zerbi presented the letter to her as representative of statements she made during the meeting with Dickstein, Opper and Zerbi at their law office. (Lorenzo Decl., ¶ 21.) They did not tell her what the purpose of the document was, or how it would be used. (Lorenzo Decl., ¶¶ 21-23.) They also told her they would make changes to it "to make it sound better." (*Id.*, ¶ 22.) She had previously signed a similar document at Dickstein's direction, when she was told by him that if she did not, the Tribe's Casino was at risk. (*Id.*, ¶ 18.)

In sum, it is apparently these Defendants who engaged in "the manufacture of evidence," as they pressured Ms. Lorenzo to sign a document they falsely tell this Court she wrote. It is thus difficult to imagine what Defendants possibly hoped to gain by this scurrilous motion. In light of their astonishing abuse of the judicial process, and in the event this Court concludes it possesses subject matter jurisdiction over this action (and denies the Tribe's pending motion to

remand), the Court should impose the kind of sanctions Defendants seek to foist upon Plaintiffs—to begin with, a protective order precluding Dickstein, Zerbi and Opper (or anyone at their direction) from communicating with Paula Lorenzo outside the presence of her legal counsel. At a minimum, Plaintiffs reserve the right to seek these and other appropriate sanctions, including issue sanctions, in connection with the apparent manufacture of "evidence."

A. The Sanctions Defendants Seek Require A Convincing Showing of Bad Faith Conduct In Litigation Or Willful Disobedience Of A Court's Orders.

1. A Court's "Inherent Authority" To Sanction Parties Is Limited To Conduct Taken In The Course Of Pending Litigation.

The U.S. Supreme Court has recognized that federal courts have the inherent authority to issue fines and similar sanctions to enforce rules and regulate conduct, and in rare cases, to dismiss the actions for bad faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991). As the Supreme Court there explained, "it is firmly established that the power to punish for contempts is inherent in all courts." *Id.* at 44. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id.* at 43. However, while the Federal Rules of Civil Procedure authorize sanctions for conduct that is merely unreasonable, a court's inherent authority only extends to "bad faith conduct or willful disobedience of a court's orders." *Id.* at 47; *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (imposition of sanctions under a court's inherent power requires finding of bad faith); *Tooms v. Leone*, 777 F. 2d 465, 471 (9th Cir. 1985) (recognizing "the imposition of sanctions under the inherent power of the court is proper where counsel has 'willfull[y] abuse[d] judicial process' or otherwise conducted litigation in bad faith.").

Importantly, as the Supreme Court has further explained, the "imposition of sanctions under the bad-faith exception depends . . . on how the parties conduct themselves *during the litigation*." *Chambers*, 501 U.S. at 53 (emphasis added). As the Ninth Circuit has likewise acknowledged:

> A court's inherent authority extends only to remedy abuses of the judicial . . . process. When a federal court, through invocation of its

> inherent powers, sanctions a party for bad-faith prelitigation conduct, it goes well beyond the exception to the American Rule and violates the Rule's careful balance between open access to the federal court system and penalties for the willful abuse of it.

Association of Flight Attendants v. Horizon Air Indus., 976 F.2d 541, 549 (9th Cir. 1992) (quoting *Chambers*, 501 U.S. at 74 (Kennedy, J., dissenting) and agreeing with Justice Kennedy's characterization of the majority opinion, concluding that the bar on inherent authority sanctions for prelitigation conduct "is the uniform view among the circuits," and declining to adopt a contrary rule). Other Circuits also hold prelitigation conduct may not be sanctioned under a court's inherent authority. *See Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 765-66 (10th Cir. 1997) (holding that the *Chambers* majority implicitly supports the position that the bad-faith exception does not permit sanctions for "bad-faith conduct not occurring during the course of the litigation itself"); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 391 (7th Cir. 2002) ("behavior in the litigation itself . . . is the only lawful domain of the relevant concept of 'inherent authority' "); *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1317 (10th Cir. 2000) ("It is well settled that the federal courts have such inherent power to sanction parties for bad faith conduct *in litigation.*" (citing *Chambers*, 501 U.S. 32, Circuit court's emphasis)).[7]

2. Dismissal Under A Court's Inherent Authority Is A "Harsh Penalty" Available "Only In Extreme Circumstances."

Even in the face of bad faith litigation conduct, the federal courts have recognized that the sanctions available to the Court under its inherent powers are "fundamentally punitive" in nature. *Shepherd, supra*, 62 F. 3d at 1476. Therefore, when dismissal is sought pursuant to a court's inherent authority, rather than pursuant to the Federal Rules of Civil Procedure or any act

[7] The Ninth Circuit recognizes an exception to this rule where a party destroys tangible evidence relevant to its claims, and where such spoliation would have been sanctionable under Federal Rule of Civil Procedure 37(b) but for the lack of a court order. *See Unigard Security Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363 (9th Cir. 1992) (plaintiff sanctioned for destroying heater and the remains of a boat in an action alleging that the heater started a fire on the boat). No such allegation of spoliation is at issue here.

of Congress, the sanction "should be imposed only in extreme circumstances." *United States v. National Medical Enterprises, Inc.*, 792 F.2d 906, 912 (9th Cir. 1986); *see also Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) ("[D]ismissal is a harsh penalty and, therefore, it should only be imposed in extreme circumstances.").

Indeed, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers, supra,* 501 U.S. at 44. In addition, while "exercis[ing] caution in invoking its inherent power," a court "must comply with the mandates of due process . . . in determining that the requisite bad faith exists . . . ." *Id.,*, 501 U.S. at 51; *see also Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) ("It is clearly established, both by common sense and by precedent, that due process requires fair notice of what conduct is prohibited before a sanction can be imposed."); *United States v. National Medical Enterprises, Inc.*, 792 F.2d at 912 (9th Cir. 1986) (reversing district court's sanction order for a party's third instance of misconduct, where two prior orders of the court did not give the party notice that the conduct at issue would result in dismissal).

Consistent with *Chambers*, the Ninth Circuit will uphold a dismissal pursuant to a court's inherent authority only after the district court makes particularized findings concerning the nature and effect of the offending conduct, and then balances the comparative harms. Specifically:

> A district court must determine (1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, and finally, as optional considerations where appropriate, (5) the prejudice to the party victim of the misconduct, and (6) the government interests at stake.

Halaco Engineering Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988); *see also Malone v. United States Postal Service*, 833 F.2d 128, 131-32 & n.1 (9th Cir. 1987) (before ordering dismissal sanction, court must consider less drastic alternatives, such as a warning or a formal reprimand). No balancing analysis need be conducted here since Defendants make no threshold showing of "extraordinary circumstances" justifying extraordinary relief.

3. The "Extreme" Circumstances Justifying Dismissal Do Not Even Arguably Exist Here.

The "extreme circumstances" that would justify the kind of relief Defendants seek are readily revealed by the facts and findings of the very cases Defendants invoke. For example, in *Chambers*, the Supreme Court upheld a dismissal under a court's inherent authority where the plaintiff's "*entire course of conduct throughout the lawsuit* evidenced bad faith and an attempt to perpetrate a fraud on the court." *Chambers, supra*, 501 U.S. at 51 (emphasis added). The balance of Defendants' cases are of similar effect, showing that "extraordinary" and "extreme" circumstances justifying such sanctions involves the contemptuous, willful abuse of the judicial process in the context of pending litigation:

- Upholding dismissal in connection with a party's "willful and repeated failure to comply with discovery obligations and her efforts to tamper with and/or bribe witnesses." *Young v. Office of the U.S. Senate Sergeant at Arms*, 217 F.R.D. 61, 64, 67-68 (D.D.C. 2003);
- Dismissing case where plaintiff "actively solicited and subporned perjury from a material witness" in litigation, offering her "financial incentives to provide perjured deposition testimony and threatening her with physical violence when she refused." *Lee v. Sass*, 2006 WL 799176, *1 & n.1 (E.D. Mich. Mar. 29, 2006);
- Imposing sanctions against plaintiffs' counsel where, after suing federal government for negligence, counsel pursued placement of advertisements encouraging public to boycott business of particular witness, and evidence showed such advertisement was "intended either to punish [the witness] for testifying or induce her not to testify" on behalf of the government, thereby justifying sanctions against the attorney. *Rohn v. United States*, 2002 WL 32123927, *3 (E.D. Cal. Aug. 27, 2002).

The above authorities involve defiance of court orders, and/or deliberate and concerted efforts to influence a witness to withhold or change actual testimony in connection with ongoing litigation. None even remotely support sanctions here (at least, not against Plaintiffs).[8]

---

[8] Defendants' reliance upon *E&J Gallo Winery v. Encana Energy Svcs., Inc.*, 2005 WL 3710352 (E.D. Cal. Aug. 15, 2005) is dubious. That case is not about witness tampering. The magistrate judge held the defense counsel's actions did not rise "to the level of felony witness tampering," but rather, by invoking a baseless procedural objective on the eve of a deposition with the purpose of its postponement, he engaged *in "bad faith interference with the discovery process" for which sanctions were justified.* Id., ** 6-7.

Moreover, as Defendants' own citations also show, where evidence proffered in favor of dismissal is subject to an innocent interpretation, courts properly refrain from exercising their inherent authority. *Helios Software GmbH v. Root Int'l Distrib. Sys., Inc.*, 1996 WL 162962, **1-2 (N.D. Cal. Apr. 5, 1996) (fact that plaintiffs had followed witnesses, told them to "think carefully" about their testimony, and reported them to the German police was "ambiguous and subject to differing interpretations," warranting no sanctions); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991) ("the district court reasonably could have found that [plaintiff] intended only to postpone the negotiations [to purchase the company that employed Holladay, an expert witness scheduled to testify against plaintiff,] and prevent any potential animosity between the negotiating parties, and not to intimidate Holladay or cause him to withdraw.").

As shown by the record before the Court, the Tribe's actions were justified under the circumstances and not taken in "bad faith." Conversely, Defendants' submission of manufactured evidence to this Court, in support of their baseless motion, justifies sanctions under this Court's inherent powers.[9]

B. The Entire Premise Of Defendants' Motion — That Plaintiffs Sought To Intimidate A Witness In An Official Proceeding — Is Unsupported By The Record, Including The Evidence From Which Defendants Selectively Quote.

Defendants' "evidence" of the Tribal Council's alleged witness intimidation consists of two letters from the Tribal Council to Ms. Paula Lorenzo, and a third document that she purportedly wrote and sent to "Arlen, Howard and Jane." (Opper Decl., Exs. A, B, C.) The letters — from which Defendants partially quote, and for which they notably fail to provide the Court full and accurate context — hardly shows, let alone convincingly shows, the Tribal

[9] Obviously when the aggrieved party is the plaintiff, the remedies awarded for bad faith under a court's inherent authority are different, as Defendants' citations show. *See Erickson v. Newmar Corp.*, 87 F. 3d 298, 303-04 (9th Cir. 1996) (plaintiff entitled to new trial where defense counsel actively solicited the retention of plaintiff's expert witnesses for another case, and by "bothering the witnesses" caused them to withdraw, forcing plaintiff to go to trial without expert witnesses).

Council sought to silence or influence Ms. Lorenzo's testimony in this lawsuit. To the contrary, as the Tribal Chairman testifies in a detailed affidavit, the Tribal Council decided it needed to bring Ms. Lorenzo before the Tribal membership, the Community Council, because it believed she had failed to cooperate in a pending investigation that sought truthful information. (McKay Decl., ¶¶ 6-9, 12.)

Notably, the Tribal Council first initiated this action vis-à-vis the former Chairperson approximately *four months before* it decided to even sue its former lawyers and financial advisor. (McKay Decl., ¶¶ 10-11.) Indeed, it was the Council's hope that the parties' dispute could and would be resolved short of litigation, and the Tribe then engaged in mediation more than a month later for that very purpose. (McKay Decl., ¶ 10.) Of course, it also was not until this mediation that the Tribal Council even knew Ms. Lorenzo had signed a letter purporting to support "Arlen, Howard and Jane." (*Id.*) In the Council's view, that action only confirmed the perception that she remained unwilling to cooperate in the Tribe's investigation, as the Council related in the letter to her. (*See* McKay Decl., ¶ 9, Ex. B.) As the Tribal Council explained, she had failed to supply information the Tribe needed for its investigation, and the act of providing Dickstein, Zerbi and Opper a letter with detailed factual statements was "inexcusable, though not entirely inconsistent with [her] conduct since the investigation began." (*Id.*)

Thus, as the timing and actual purpose behind the Council's action shows, Ms. Lorenzo's suspension (with pay) could not possibly have been designed to silence testimony. Suspending or terminating employees or officials who refuse to cooperate with an ongoing investigation being conducted by a private or public entity is an appropriate remedy, and indeed, the courts have "repeatedly held that removal from employment is justified for failure to cooperate with an investigation." *Sher v. United States VA*, 488 F.3d 489, 509 (1st Cir. 2007) (citing *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 991 (7th Cir. 2002) (refusal to answer any questions in investigation constituted grounds for dismissal) and *Weston v. U.S. Dep't of Housing & Urban Dev.*, 724 F.2d 943, 948 (Fed. Cir. 1983) (refusal to participate in a proposed investigation justified dismissal)). This rule applies to government officials as well as employees. *Id.*, *see also Ferguson v. Ga. Dep't of Corr.*, 428 F. Supp. 2d 1339, 1362 (M.D. Ga. 2006). In the

private sector, refusal to cooperate in an internal investigation also constitutes grounds for dismissal. *Costello v. St. Francis Hosp.*, 258 F. Supp. 2d 144, 156 (E.D.N.Y. 2003) ("An employee's failure or refusal to cooperate with an internal investigation can constitute a legitimate, non-discriminatory reason for terminating one's employment."); *Allen v. St. Cabrini Nursing Home, Inc.*, 198 F. Supp. 2d 442, 451 (S.D.N.Y. 2002) (refusal to participate in an internal investigation constituted "flagrant insubordination" and employer had "no alternative but to terminate plaintiff's employment").

By any standard, the Tribal Council was justified and acting within its executive discretion to take the action it did, and at a minimum, its action is easily susceptible to an innocent interpretation, since it predated any decision to proceed with the litigation. Moreover, the Tribal Council's innocent motivation is further shown by the Tribal Chairman's explanation of the Council's frustration with a former Tribal officer who failed to provide factual information needed for an investigation into the Tribe's prior advisors, and his explanation as to why the Council took the action that it did. (McKay Decl., ¶¶ 6-9, 14-15.)

Nonetheless, Defendants argue the Tribal Council's action was "an obvious attempt to dissuade her from providing further evidence or testimony in the case." (Mem. at 6:27-28.) Again, this accusation begs the question: What case? There was no case. As of the date of suspension, there then existed only an effort to mediate a dispute for the purposes of avoiding *a case*. That effort failed. (McKay Decl., ¶ 11.) There thus was no apparent prospect of "testimony," and in any event, as the Tribe now knows, the letter Defendants provided during mediation (and now wave before the) is not "evidence" of anything Paula Lorenzo actually wrote (or even said or believed) (*see* Lorenzo Decl., ¶¶ 11, 21-22, 24-25).) Rather, it is evidence of Defendants' own bad faith and self-serving (not to mention repulsive) attempt to manipulate the representative of their own former client for their own ends. (*See* Lorenzo Decl., ¶¶ 15, 20-25.)[10]

[10] Likewise, Ms. Lorenzo has not "directly contradict[ed] the allegations in the complaint." Mem. at 10:3. When the letter was drafted (by Defendants), there was no complaint.

C. In An Argument That Turns Defendants' Request For Equitable Relief On Its Head, Defendants Deceive This Court And Then Seek To Gain Evidentiary Advantage With Manufactured Evidence.

In the event this Court declines Defendants' request for outright dismissal, Defendants seek alternative relief based on a deceptive argument that seeks to reward Defendants for their own fraud. Specifically, Defendants ask this Court "to impose an issue sanction against Plaintiffs and accept as true those assertions made by Lorenzo in her letter of July 20, 2007." (Mem., at 12:7-8.) "Alternatively," Defendants argue, "the Court should impose an evidentiary sanction against Plaintiffs, and preclude them from introducing evidence at trial to refute the assertions in Lorenzo's letter of July 20, 2007." (*Id.*, at 12:8-10.)

The Tribe can certainly understand why Defendants do not want a jury to decide the factual predicates driving the Tribe's claims. It can also understand why Defendants would prefer to avoid any discovery surrounding the content of "Lorenzo's letter" (Mem. at 12:10), not to mention the circumstances surrounding how the document came to exist. But their request of this Court to deem true and incontrovertible the content of a document that Defendants claim Paula Lorenzo "wrote" them (Mem. at 5:14-15, 11:21-23) — but that in reality they themselves manufactured in Dickstein's law office (Lorenzo Decl., ¶¶ 11, 20-23) — is a fraud on the Court and must be denied. As the Tribe's former Chairperson testifies (and as Defendants have obviously known all along), the document is not "her letter" (Mem. at 11:22), but rather, theirs. (Lorenzo Decl., ¶¶ 11, 20-23.)

In contrast to Defendants' numerous assertions that Lorenzo "wrote" them the "letter,"[11] the Court should note the careful wording of Arlen Opper's declaration. (The Court should also note that Dickstein and Zerbi, who join this motion and who were centrally involved in the

---

[11] *See* Mem. at 2:16 ("Ms. Lorenzo provided written statements"); at 2:18 ("Her words were clear and precise" and "she wrote"); at 4:12 ("Lorenzo [] flatly contradicted these allegations in writing"): id. ("Based on her written statements..."); at 5:14-15 ("Lorenzo wrote a letter to Dickstein, Opper and Defendant Jane Zerbie [sic]"); at 5:18 ("Lorenzo wrote"); at 11:22 ("her letter of July 20, 2007"); at 12:8 ("Lorenzo in her letter of July 20, 2007"); at 12:10 ("Lorenzo's letter of July 20, 2007").

document's creation, submit no declaration.) Opper testifies the letter was "addressed to me and signed by Paula Lorenzo," and that he "received a copy of this letter" before the mediation. (Opper Decl., ¶ 3.) While none of this is inconsistent with Lorenzo's testimony, the declaration borders on the perjurious since the declaration, combined with the assertions in the brief, is quite obviously carefully crafted to deceive the Court about what actually occurred. What actually occurred, as Ms. Lorenzo testifies, is that the letter was prepared by Dickstein, Zerbi and Opper just days before the mediation. (Lorenzo Decl., ¶¶ 11, 20-23.) Moreover, not only did Ms. Lorenzo not "write" letter, she also testifies she did not carefully read it and felt pressure to sign it while at Dickstein's office. They also told her they might make further changes to it, and having now had the opportunity to carefully review the document with her personal counsel, she disavows much of it. (*Id.*, ¶¶ 22, 24-25.)

In effect, then, Defendants' argument is the pinnacle of deception. They seek evidentiary advantage through their own fraudulent effort to manufacture the evidence in question, and they do so by deceiving this Court about the circumstances surrounding the letter upon which their argument relies. "Lying cannot be condoned in any formal proceeding" (*Lee*, 2006 WL 799176, at *1). Defendants' entire argument, however, is built on misrepresentation. The matter is akin to the situation in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 243 (1944), a patent infringement case in which the prevailing party had misrepresented the author of an article material to its claims (an article that was, in reality, authored by the party's legal counsel), and the U.S. Supreme Court concluded the party engaged in a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.*, at 247. So, too, here.[12]

Needless to say, the Court should deny Defendants' request that evidence they created be deemed true and incontrovertible. To do otherwise would constitute a manifest miscarriage of

[12] As earlier noted, this is not the first manufactured document. In June 2006, Dickstein (probably in collusion with Opper and Zerbi or at a minimum with their knowledge) also prepared fake meeting minutes that he directed Ms. Lorenzo (and others) to sign for Defendants' own evidentiary purposes. (Lorenzo Decl., ¶¶ 11, 18-19; *and see* McKay Decl., ¶ 17.)

justice, in violation of all notions of fundamental fairness, and the mandates of due process. Further, even without considering the larger constitutional and ethical implications of Defendants' motion, basic rules of evidence prohibit the Court from deeming a letter to be true and incontrovertible as a matter of law, when the so-called "author" has disavowed its contents and authenticity. (Lorenzo Decl., ¶¶ 11, 20-25.)

Moreover, issuing a sanction under a court's inherent power is improper because it "would constitute an unnecessary and drastic substitute for the adversary process of litigation." *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 382 (9th Cir. 1988) (reversing dismissal sanction based on production of incomplete document where opposing party was free to attack the document at trial). Cross examination is the primary tool for uncovering improper influence of a witness. *See Geders v. United States*, 425 U.S. 80, 89-90 (1976); *see* Fed. R. Evid. 611(b) ("matters affecting the credibility of the witness" are proper subject matter for cross-examination). An important part of any trial on the merits is a decision by the trier of fact, following the parties' presentation of evidence, as to whether to credit a witness's testimony. *See, e.g., Douglas v. Owens*, 50 F.3d 1226, 1231 (3d Cir. 1995) (party entitled to present evidence that witness, who had recently been terminated, had a motive to testify falsely against his former employer). Here, rather than subjecting Defendants' baseless accusations to the normal rigors of litigation on the merits, they transform a common smear of a witness's credibility into a threshold request for "extreme" relief. *See National Medical*, 792 F.2d at 912. The request should be denied.

D. The Court Should Further Explore Defendants' Misconduct and Issue Appropriate Protective Orders.

At the risk of stating the obvious, the evidence the Tribe submits is highly disturbing, as it suggests Defendants Dickstein, Zerbi and Opper set out to affirmatively mislead this Court with manufactured evidence. Given the seriousness of such, the Tribe asks the Court to exercise its powers under Rule 11(c)(3) the Federal Rules of Civil Procedure, and issue an Order to Show Cause as to why Defendants should not be sanctioned for violating Rule 11(b), which requires that a party's "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable... investigation..." The Tribe further asks the

Court, under its inherent power, to issue a protective order directing Dickstein, Zerbi and Opper to cease and desist from communicating with Paula Lorenzo outside the presence of her legal counsel (either directly or through a third party). The Tribe further asks the Court to direct Dickstein, Zerbi and Opper to maintain and preserve any and all computers they (and their agents) use and the contents thereof, for the purpose of preserving needed evidence for a forensic analysis the Tribe will seek in discovery. In the event the Court does not decide these requests, the Tribe reserves the right to seek such relief and all appropriate sanctions.

V. CONCLUSION

Defendants argue that *after* the Tribe terminated Dickstein, Zerbi and Opper for self-dealing and undisclosed conflicts of interest (among other problems), "behind the scenes," and, "hidden from public view, another drama was playing out," as the former Tribal Chairperson was "provid[ing] written statements specifically refuting the very allegations" upon which the Tribe had based its termination of Dickstein, Zerbi and Opper. (Mem. at 2:13-17.) Indeed, Defendants are correct: "Another drama was playing out," but the evidence shows Dickstein, Zerbi and Opper — not Tribal Council members — were directing it. Having manufactured evidence upon which they rely, Defendants' deceptive motion is nothing more than an effort to publicly smear the Tribe for the kind of bad faith conduct of which they appear to be guilty. Their motion should be denied, with the Court issuing an Order to Show Cause as to why they themselves should not be appropriately sanctioned for deceiving this Court to secure tactical advantage from evidence they created.

Dated: January 14, 2008

COTCHETT, PITRE & MCCARTHY

By: /s/ *Niall P. McCarthy*
NIALL P. McCARTHY
Attorneys for Plaintiffs
RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA; RUMSEY GOVERNMENT PROPERTY FUND I, LLC; RUMSEY DEVELOPMENT CORPORATION; RUMSEY TRIBAL DEVELOPMENT CORPORATION; RUMSEY MANAGEMENT GROUP; AND RUMSEY AUTOMOTIVE GROUP